MOHAMAD YASSIN ISA & ORS.

v.

M.C.W. EXPRESS SDN. BHD. & ORS.

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 13 OF 1983]
4 DECEMBER 1986

DAMAGES: *Negligence - Injuries sustained - Fracture of upper one third of the left radius - Comminuted fracture of lower end of left radius - Compound dislocation of ulnar head - Comminuted fracture of two ribs - Multiple lacerations - Plaintiff was a taxi driver aged 52 years - Claim for loss of future earnings.*

The defendant admitted liability. The plaintiff sustained the following injuries in an accident: a fracture of the upper one third of the left radius; a comminuted fracture of the lower end of the left radius, a compound dislocation of the ulnar head, a comminuted fracture of the right patella, a fracture of left fifth and sixth ribs and multiple lacerations of the face and right upper limb. The plaintiff also claimed *inter alia* special damages for native medicine and herbs and pre-trial loss of earnings. The plaintiff was hospitalised for 100 days and attended out-patient clinic for 263 days. It was agreed that he earned RM700 per month. He also claimed general damages for loss of future earnings. The plaintiff was a taxi driver. He was 52 years at the material time.

Held:

[1] The plaintiff failed to prove the expenses incurred for native medicine. Special damages in the sum of RM2,335 as loss of earnings was awarded for the period he was hospitalised. Special damages in the sum of RM5,200 was awarded as loss of earnings for the period he attended out-patient treatment. The sum awarded for the latter period was at the rate of RM600 per month as he was under partial temporary disability.

[2] General damages in the sum of RM31,500 was awarded for the injuries sustained.

[3] General damages in the sum of RM11,160 was awarded for loss of future earnings.

[4] Interest at 4% per annum was awarded on special damages from date of accident. Interest at 8% per annum was awarded on general damages from date of service of writ. No interest was awarded on loss of future earnings. The plaintiff was awarded costs.

[Judgment to plaintiff.]

Cases referred to:

Harry Seah Hong Meng v. Tan Siow Cher [1984] 2 MLJ xxix
Ngooi Ku Siong & Anor. v. Aidi Abdullah [1985] 1 MLJ 30
Tan Ah Tee @ Tan Tai Lee v. The Attorney-General & Anor. [1975] 2 MLJ iv
Ramoo v. Ong Ah Ho & Anor. [1968] 2 MLJ 66
Chan Lye Huat v. Tan Ong Kong @ Chan Man Kong [1985] CLJ (Rep) 430
Chan Sau Swee & Anor. v. Siew Chow Yin & Ors. [1965] 2 MLJ viii
John Arthur Harper v. Lim Ah Nau [1982] 2 MLJ xlviii
Chong Kim Kee v. Tan Kok Hua [1968] 2 MLJ xxii
Tay Peck Low v. Lin Ngo [1986] 1 MLJ xci
Murtadza bin Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 216
Ahmad Nordin bin Haji Maslan & Anor. v. Eng Ngak Hua & Ors. [1985] 2 MLJ 431

For the plaintiff - M/s. E. Ramasamy & Co.
For the defendants - M/s. Vohrah & Tan Chee Lan

JUDGMENT

Wan Yahya J:

Liability in this case has been agreed at 100% against the defendant and the dispute thereby confined to the quantum of damages assessed by this Court. At the conclusion of the defendant's case the parties had also come to terms on plaintiff's claim for special damages as follows:

Claim on (a) to (b) at RM700; Item (d) at RM80 and item (f) at RM220 and the net monthly earnings of the plaintiff (item (g)) be fixed at RM700 per month. In respect of item (c) the plaintiff discontinued the claim with liberty to file afresh in the Sessions Court.

That being the case our assessment had been done only in respect of item (e) under special damages i.e. claim for native medicine and herbs and the plaintiff's pre-trial loss of earnings (item (g)) and of course general damages.

My assessment, following the sequence of the plaintiff's statement of claim are as follows:

Special Damages - Item (e)

Although the claim is specifically particularised as expenses on native medicines and herbs, the plaintiff unexpectedly came out in his sworn evidence that he had spent RM4,000 to RM5,000 on massages presumably by bomohs. However he did not identify these people and neither could he provide receipts or any rough estimates or breakdown in the calculation leading to the figures he claimed.

I therefore totally disallow this claim.

Item(g)

For the pre-trial loss of earnings I noted that the plaintiff had been in hospital and therefore under total disability for 100 days i.e. from 14 August 1980 to 20 November 1980. I therefore awarded him the full sum for loss of earnings agreed at RM700 per month for 3 months amounting to RM2,335. Then from 23 November 1980 to 13 August 1981 I observed that the plaintiff was attending to out-patient treatment and as such could not have been fully employed. I treated him as having being under partial temporary disability and awarded him a sum which is RM100 less than his full earning capacity i.e. RM600 for 8 months (263 days) amounting to RM5,200.

General Damages

It would appear from the medical report of Dr. Thomas Verghese, Orthopaedic Specialist that plaintiff suffered the following injuries:

(1) A fracture of the upper one-third of the left radius.

(2) A comminuted fracture of the lower end of left radius.

(3) A compound dislocation of the ulnar head.

(4) A comminuted fracture of the right patella.

(5) A fracture of the left 5th and 6th ribs.

(6) Multiple lacerations of the face and right upper limb.

For the purpose of consistent comparison with authorities of past awards by different Courts I shall deal with injuries 1 - 3 together and the rest separately.

Injuries Nos. 1, 2 & 3 (Fracture of one-third upper left radius; Comminuted fracture of lower left radius and Compound dislocation of ulnar head)

Counsel for the defendant citing *Tan See Peng v. Tang Yong Muang, Dass* Vol. 3 p. 71, where a sum of RM6,572 was awarded, suggested that the plaintiff be given RM10,000 for his more serious injuries. Mr. Ramasamy for the plaintiff referred to *Harry Seah Hong Meng v. Tan Siow Cher,* [1984] 2 MLJ xxix; *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ 30 and *Tan Ah Tee @ Tan Tai Lee v. The Attorney-General & Anor* [1975] 2 MLJ iv involving injuries to radius and ulnar and in respect of each RM15,000 was awarded. He also cited *Ramoo v. Ong Ah Ho & Anor* [1968] 2 MLJ 66 where RM13,000 was awarded for compound fracture of the left elbow joint severely restricting elbow movement. However he appears to be depending on *Chan Lye Huat v. Tan Ong Kong @ Chan Man Kong* [1985] CLJ (Rep) 430 when he suggested an award of between RM20,000 to RM25,000.

Chan Lye Huat's case involving a much more serious injuries was awarded RM20,000. In my assessment therefore a less serious case as our present one merits a lesser award. The present award of RM18,500 therefore to my mind is fair.

Injury No. 4 (Comminuted fracture of right patella)

My attention has been drawn to *Cheng Choo Ping v. Omar bin Hassan, Dass* Vol. 3 p. 173 where RM8,000 was awarded; *Feng Joo Meng v. Mohd. Isman bin Komari, Dass* Vol. 3 p. 202 - RM11,500 awarded and *Chan Sau Swee & Anor. v. Siew Chow Yin & Ors.* [1965] 2 MLJ viii - RM7,000 awarded. Mr. Ramasamy for the plaintiff suggested that an award of RM15,000 be given under this item as there is a reduction of the plaintiff's arms movement by 60%. Mr. Vohrah for the defendant felt that the plaintiff merits only RM7,000 award as there was no osteo-arthritis changes involved. Of the three authorities, *Feng Joo Meng's* case appears to be more serious than our present case. This is perceivable from the trial Judge's comments at p. 203 which reads:

> Mr. Feng had sustained a badly comminuted fracture of the right patella. This has necessitated the removal of this bone. The operation entailed immobilisation of the right knee for about six weeks with its resultant stiffness and the weakness of the quadriceps muscles. Although the range of motion of the right knee is now full, the removal of the patella has resulted in alteration of the normal bio-mechanics of the knee. This, together with the wasting of the quadriceps muscles makes the knee weaker and prone to future injury unless the patient develops his knee assidiously.

I am of the view that the plaintiff's injury under this heading merits between RM8,000 and RM9,000. I made an award of RM8,500

Injury No.5 (Fracture of the left 5th and 6th ribs)

Plaintiff's Counsel citing *John Arthur Harper v. Lim Ah Nau* [1982] 2 MLJ xlviii where RM7,000 was awarded for fracture of 2 ribs and *Chong Kim Kee v. Tan Kok Hua* [1968] 2 MLJ xxii - RM3,000 awarded, suggested that an award of between RM4,000 to RM5,000 be given. In view of the fact that there has been complete recovery of the plaintiff's 2 ribs and also owing to my decision not to make deductions on overlapping injuries, an award of RM3,000 under this item appears to me to be in order.

Injury No.6 (Multiple lacerations)

Tay Peck Low v. Lin Ngo [1986] 1 MLJ xci, a recent case referred by the defendant's Counsel on this type of injuries involves head and limb lacerations. An award of RM3,500 was allowed in that case. However the quantum therein awarded appertaining to lacerations and scars on a lady teacher must be considered to be more damaging than similar injuries suffered by a 51 year old man. An award of RM1,500 appears fair under the circumstances.

General Damages - Loss of future earnings.

I agree with plaintiff's Counsel remarks that if an employed 60 year old man is making this claim for loss of future earnings, he cannot be assessed with a zero multiplier. If a claimant has passed the age of 55 and could show that he is being usefully employed, then obviously the Court should have regard to his capacity to work past that age. However for those who have not attained the age of 55, a certain point in time must be taken as the average or acknowledged age at which a person's working life is presumed to end and he is expected to go into retirement. True, that some people can go on working well past their retiring ages but they form the exception rather than the rule. Should the plaintiff feel that he belongs to this exceptional category of men with potential capacity to work right up to the age of 65, then he should introduce convincing evidence to that effect. A mere verbal assertion that he could work up to 60 years and the testimony of another 66 year old man who claims to be still driving a taxi but gave no particulars of the taxi or the company for which he works are by no means persuasive enough for me to accept his claim. Now the 66 year old witness did not say at all the route he is now plying or the distance he covered in a day. Furthermore the plaintiff did not at any moment claim that he enjoyed the same health as this witness (PW2) who happens to be a retired policeman and appears to be physically fit to me. A few centenarian amongst the population of a village could not mean that each and everyone of the villagers can attain the life span of over 100 years.

In reckoning the expectancy of life or the prospective length of employment of a disabled plaintiff, the proper computation is usually arrived at by comparing him with those of similar health and occupation. I can find little similarity between the plaintiff and his witness (PW2) in this respect.

Long distance taxi drivers like the present plaintiff who claims to cover trips from Kuala Lumpur to Johore Bahru and back, thus covering a distance of about 500 miles of the road in one day is certainly engaged in a strenuous and hazardous occupation. Such work requires not only physical endurance but continuous alertness and skilful driving. It is therefore reasonable to assume that the retiring age of person belonging to this type of occupation to be at 55 years. I find support of this view from the Federal Court Judgment of *Murtadza bin Mohamed Hassan v. Chong Swee Pian*, [1980] 1 MLJ 216 at p. 218 in which Chang Min Tat FJ states:

> A review of our local cases on loss of future earnings shows however a disposition towards 55 years as being more common than one towards 60 ... For myself in the circumstances of this case, having regard to the facts among others, that lorry driving is quite obviously and by itself a very strenuous occupation and in the absence of any evidence to the contrary, I would take the respondent's useful working life as ending at 55 years.

Similarly in the recent judgment of the Supreme Court in *Ahmad Nordin bin Haji Maslan & Anor. v. Eng Ngak Hua & Ors.* [1985] 2 MLJ 431 at 435 Syed Agil Barakbah SCJ expressed the following views:

In obtaining the multiplier of 25 years purchase, the learned Judge fixed 65 years as the probable retiring age as the deceased was a self-employed man. We are of the view that this is excessive. There are authorities showing that 55 years have been accepted as the retiring age. *(Lai Chi Kay v. Lee Kuo Shin)* (*supra*). In *Lai Wee Lian v. Singapore Bus Service* [1978] Ltd. (*supra*), it was agreed that the age of 55 is regarded as the normal retiring age for men and women in Singapore. A similar age limit was accepted by this Court in *Murtadza bin Mohamed Hassan v. Chong Swee Pian* (*supra*) and by the Privy Council in *K. Ratnasingam v. Kow Ah Dek & Anor*. (*supra*). A review of our local cases for loss of future earnings shows a disposition towards 55 years as being more common. We adopt the same view and take the deceased's working life as ending 55.

The plaintiff in our present case was 52 years at the time of the accident. He had been compensated for his pre-trial loss earlier under item (g) of the special damages for 363 days i.e. about a year, leaving a loss of future earnings of about 2 years on the assumption that he would retire at 55. I consider his future earnings towards the end of his career to be somewhat lesser, say RM500 per month. Applying this multiplier on the Actuary Tables for 2 years I arrive at a figure of RM11,160 which I accordingly awarded to him as his loss of future earnings.

The plaintiff shall also be awarded costs and interests on special damages at 4% from date of accident and on general damages at 8% from the date of service of the writ. There shall be no interest payable on loss of future earnings.

Also found at [1988] 1 CLJ 821